

A **SAM MAARK VERAK v. DATO' ZAINAL ABIDIN AHMAD & ORS**

COURT OF APPEAL, PUTRAJAYA

HANIPAH FARIKULLAH JCA

LEE SWEE SENG JCA

DARRYL GOON SIEW CHYE JCA

B [CIVIL APPEAL NO: B-01(A)-742-12-2019]
27 JANUARY 2022

C **Abstract** – *The court should be very slow to deem any punishment meted out by the Public Services Commission in disciplinary cases against public servants as being disproportionate. The danger of a court substituting its personal views as to what is or is not proportionate is very real. How strict the public sector wishes to be on matters of discipline may depend on many factors and circumstances and the justification may lie in the policies developed to tackle certain problems or issues that the public sector may be facing; and these may not be manifest from the facts of any given case.*

E **ADMINISTRATIVE LAW:** *Judicial review – Dismissal – Challenge by public servant against decision of Public Services Commission – Public servant charged and found guilty by Public Services Commission for absence from duty, failing to register movements in/or out of office and coming in late for duty to office without leave or without reasonable cause – Public servant dismissed from service – Whether charges against public servant defective – Whether there was requirement for prior internal investigation before public servant was charged and disciplinary action taken – Whether punishment meted out disproportionate and too severe*

G This case concerned a challenge by the appellant against the decision of the Public Services Commission ('PSC') in ordering his dismissal as a Deputy Director of Customs. The appellant was issued with a show cause letter by the PSC charging him for: (i) being absent from duty without leave or without prior permission or without reasonable cause for 84 days, contrary to reg. 24 of the Public Officers (Conduct and Discipline) Regulations 1993 ('Regulations'); (ii) failing to register his movements in or out of the office or punching his punch card on 29 occasions, contrary to Surat Pekeliling Am Bil. 11 Tahun 1981 and Pekeliling Perkhidmatan Bil. 2 Tahun 2007; and
H (iii) coming in late for duty to the office without leave or without reasonable cause for 25 times and leaving early once, contrary to Perintah Am 5, Perintah-perintah Am Bab G. The appellant provided his written representation but the PSC found that he had failed to exculpate himself of all the charges preferred against him. The appellant was found guilty and
I accordingly dismissed. Following this, the appellant sought and obtained leave of the High Court to apply for a judicial review of the decision

dismissing him. The High Court went on to dismiss the application and hence the present appeal. The appellant contended that (i) the charges against him were defective as the number of days stated in the charges were not all proven; (ii) there was no prior internal investigation before the appellant was charged and disciplinary action taken. By reason of regs. 6.1.2 and 6.1.4 of the Perintah Am Bil. 177 – Pelaksanaan Dan Pemantauan Kehadiran Waktu Bekerja ('Perintah Am Bil. 177'), there had to be an internal inquiry failing which, as in this case, there would exist procedural impropriety. There was also a need for a Committee of Investigation to be constituted under reg. 37(5) of the Regulations; (iii) as an audit officer, the appellant was required to work out of the office upon instructions and this was supported by the appellant's supervisor. In fact, there was evidence of a memoranda instructing the appellant to attend assignments, courses and other matters; and (iv) the punishment meted out was disproportionate and too severe.

Held (dismissing appeal)

Per Darryl Goon Siew Chye JCA delivering the judgment of the court:

- (1) There was no logical or rational basis why the charges were said to be defective merely because the total number of days the appellant was found to have been absent from duty or had failed to record his attendance did not match the exact number of days set out in the charges. The Chairman of the PSC, in his affidavit, had disclosed the total number of days that the appellant was found to have been absent from duty and the number of days that the appellant failed to record his attendance, including when he left his office, were fewer than those presented in the charges. One could not help but conclude that this indicated that there was sufficiently careful consideration of the charges presented without which these findings could not have been made. (paras 41 & 42)
- (2) Regulations 6.1.2 and 6.1.4 of the Perintah Am Bil. 177, evident from the title given, were for the implementation and monitoring of attendances at work. That there existed systems and regulations for monitoring attendance at work, the time an officer arrives for work and leave and the requirement of monthly reports left no doubt that attendance at work was clearly a matter of significant importance. That such regulations were required also suggested that there was a need for them. However, nowhere was it suggested that there was a need for an internal inquiry before disciplinary action may be taken. It also could not be the case that should there be a failure of a supervising officer to invoke reg. 6.1.4, disciplinary action may therefore never be taken. The disciplinary provisions under the Regulations and the Perintah Am Bil. 177 were two discrete sets of regulations. Neither was conditional upon the other being first invoked. There was also no need for a Committee of Investigation to be constituted under reg. 37(5) of the Regulations. (paras 44, 45 & 47-49)

- A (3) No evidence of any specific instructions was provided by the appellant to exculpate himself from the charges in respect of all those occasions that he was found to have failed to report or record as required. In fact, evidence was led from his supervisors but there was little, if any specificity in the evidence, to justify the appellant's failure to report for duty or record his time of arrival for and departure from work on those specific days that he was found to have failed to do so. That he had to work out of office on occasions was confirmed by his supervisors but there was no justification given for why he had failed to report for work on those occasions that were proven or why he failed to record his time of arrival and departure from the office. There was no illegality, procedural impropriety or irrationality demonstrated in respect of the disciplinary proceedings in question, its process or the decision arrived at. (paras 55 & 58)
- B
- C
- D (4) The issue of proportionality of the sentence meted out was not raised in the appellant's statement given pursuant to O. 53 r. 3(2) of the Rules of Court 2012. Order 53 r. 3(2), in respect of the statement to be provided when obtaining leave, is couched in mandatory terms. It would appear to have been an afterthought, having regard to the fact that it was only raised in the appellant's supplementary memorandum of appeal. (para 59)
- E

Case(s) referred to:

- Abdul Aziz Mohd Alias v. Timbalan Ketua Polis Negara, Malaysia & Anor* [2010] 3 CLJ 643 FC (*refd*)
- Ang Seng Wan v. Suruhanjaya Polis Di Raja Malaysia & Anor* [2002] 1 CLJ 493 CA (*refd*)
- F *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 (*refd*)
- Dr Lourdes Dava Raj Curuz Durai Raj v. Dr Milton Lum Siew Wah & Anor* [2020] 9 CLJ 192 FC (*refd*)
- Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19 CA (*refd*)
- Iszam Kamal Ismail v. Prestij Bestari Sdn Bhd; Majlis Peguam Malaysia (Intervener)* [2017] 10 CLJ 417 CA (*refd*)
- G *Letitia Bosman v. PP & Other Appeals* [2020] 8 CLJ 147 FC (*refd*)
- Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65 FC (*refd*)
- Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579 FC (*refd*)
- Nazrul Imran Mohd Nor v. Civil Service Commission Malaysia & Anor* [2021] 10 CLJ 737 CA (*refd*)
- H *Ng Hock Cheng v. Pengarah Am Penjara & Ors* [1998] 1 CLJ 405 FC (*refd*)
- Norizan Bakar v. Panzana Enterprise Sdn Bhd* [2013] 9 CLJ 409 FC (*refd*)
- Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu* [2008] 6 CLJ 573 FC (*refd*)
- R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147 FC (*refd*)
- Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771 CA (*refd*)
- I *V Paul Raj Chelladurai v. Jabatan Telekom Malaysia Bhd & Ors* [2000] 4 CLJ 882 CA (*refd*)

Legislation referred to:

Federal Constitution, art. 132

Industrial Relations Act 1967, s. 20(3)

Public Officers (Conduct and Discipline) (Cap D) General Orders 1980, GO. 26(4)

Public Officers (Conduct and Discipline) Regulations 1993, regs. 4(2)(g), (i), 24, 37(1), (2)(b), (5)

Rules of Court 2012, O. 53 rr. 3(1), (2)

*For the appellant - Thayalan Moorthy; M/s Dharan & Thaya**For the respondents - Kogilambigai Muthusamy; FC**[Editor's note: For the High Court judgment, please see Sam Maark Verak lwn. Dato' Zainal Abidin Ahmad & Yang Lain [2018] 1 LNS 1956 (affirmed).]**Reported by Lina E***JUDGMENT****Darryl Goon Siew Chye JCA:**

[1] This case concerned a challenge by the appellant to the decision of the public services commission in ordering his dismissal as a Deputy Director of Customs after having found him guilty of three disciplinary charges preferred against him.

The Background Facts

[2] The appellant was at all material times a civil servant holding the position of a Deputy Director of Customs, grade WK44 (acting) in the Royal Malaysian Customs Department. At the time of his actual dismissal, the appellant was serving in the Technical Services Division of the Royal Malaysian Customs Department in Putrajaya.

[3] A complaint with several allegations was lodged against the appellant with the Chairman of the Lembaga Tatatertib Bagi Kumpulan Pengurusan (No. 2) Jabatan Kastam Diraja, Malaysia. The appellant was then serving in the Cawangan Pematuhan, Stesen Bentong, of the Royal Malaysian Customs Department in the state of Pahang.

[4] On 29 June 2015, the Chairman of the Lembaga Tatatertib Bagi Kumpulan Pengurusan (No. 2) Jabatan Kastam Diraja Malaysia, after having considered the complaint, had determined that the subject matter of the complaint was of such a nature that warrants a dismissal or reduction in rank in accordance with reg. 37(1) of the Public Officers (Conduct and Discipline) Regulations 1993, made pursuant to art. 132 of the Federal Constitution.

[5] The matter was then referred to the Public Services Commission of Malaysia. The Chairman of the Public Services Commission decided that there was a *prima facie* case made out against the appellant in accordance with reg. 37(2) and his decision was set out in writing dated 28 April 2017.

A [6] The appellant was then issued with what may be described as a show cause letter dated 4 May 2017, with the three charges set out therein against the appellant:

B (i) for being absent from duty without leave or without prior permission or without reasonable cause for a total of 84 days (63 days in 2014 and 21 days in 2015) contrary to reg. 24 of the Public Officers (Conduct and Discipline) Regulations 1993 (“first charge”);

C [“Bahawa tuan, Sam Maark a/1 Verak (K.P.:771021-09-7279), Penguasa Kastam Gred WK44 (Memangku) semasa bertugas di Cawangan Pematuhan, Stesen Bentong, Jabatan Kastam Diraja Malaysia, Pahang telah melakukan kesalahan tidak hadir bertugas tanpa cuti atau tanpa terlebih dahulu mendapat kebenaran atau tanpa sebab munasabah selama 84 hari pada tarikh-tarikh seperti berikut: ...”]

D (ii) for failing to register his movements in or out of the office or punching his punch card on 29 occasions *ie*, 8 in, 21 out, contrary to Surat Pekeliling Am Bil. 11 Tahun 1981 and Pekeliling Perkhidmatan Bil. 2 Tahun 2007 (“second charge”);

E [“Bahawa tuan, Sam Maark a/1 Verak (K.P.:771021-09-7279), Penguasa Kastam Gred WK44 (Memangku) semasa bertugas di Cawangan Pematuhan, Stesen Bentong, Jabatan Kastam Diraja Malaysia, Pahang telah melakukan kesalahan tidak mendaftar kedatangan atau kepulangan atau mengetik Kad Perakam Waktu sebanyak 29 kali iaitu 8 kali ketika masuk dan 21 kali ketika keluar seperti berikut: ...”]

F and

 (iii) for coming in late for duty to the office without leave or without reasonable cause for 25 times and leaving early once, contrary to Perintah Am 5, Perintah-Perintah Am Bab G (“third charge”).

G [“Bahawa tuan, Sam Maark a/1 Verak (K.P.:771021-09-7279), Penguasa Kastam Gred WK44 (Memangku) semasa bertugas di Cawangan Pematuhan, Stesen Bentong, Jabatan Kastam Diraja Malaysia, Pahang telah melakukan kesalahan lewat hadir bertugas ke pejabat tanpa kebenaran atau sebab yang munasabah sebanyak 25 kali dan balik awal sebanyak satu (1) kali pada tarikh-tarikh seperti berikut: ...”]

H Particulars of the relevant months, dates and time relating to the charges were provided in a table below the charges including the relevant provisions in the Public Officers (Conduct and Discipline) Regulations 1993, relied upon.

I [7] The appellant was provided an opportunity to be heard according to the procedure provided under para. (2)(b) of reg. 37 of the Public Officers (Conduct and Discipline) Regulations 1993. Accordingly, the appellant provided his written representation, dated 28 June 2017, to the charges preferred against him.

[8] On 12 February 2018, having considered the appellant's representation, the Public Services Commission found that the appellant had failed to exculpate himself of all the charges preferred against him although the number of days he was found to have been guilty, based on the charges, were less than those set out in the charges. The appellant was found guilty of all three charges and the decision made was that the appellant be dismissed with effect from 12 February 2018.

A

B

[9] Following this, the appellant sought and obtained leave to apply for a judicial review of the decision dismissing him. The reliefs sought by the appellant were the following:

C

2. Relif-relif yang dituntut oleh Pemohon adalah seperti berikut:

2.1 Bahawa kebenaran dan kebebasan diberikan kepada Pemohon untuk memohon Semakan Kehakiman di bawah Aturan 53 Kaedah 3(1) Kaedah-Kaedah Mahkamah 2012;

2.2 Bahawa satu Perintah *Certiorari* diberi untuk membatalkan dan mengenyahkan sama sekali keputusan Pihak berkuasa Tatatertib Suruhanjaya Perkhidmatan Awam Malaysia (Responden Pertama) dan Suruhanjaya Perkhidmatan Awam Malaysia (Responden Kedua) yang telah diberikan melalui surat bertarikh 20 Februari 2018 dan diterima oleh Pemohon pada 6 Mac 2018;

D

2.3 Bahawa suatu perintah Deklarasi bahawa hukuman buang kerja ke atas Pemohon adalah batal dan tidak sah ("null and void") dan tidak berkuatkuasa dan diketepikan dan Pemohon dikekalkan "*status quo*" Pemohon kepada jawatan asal sebagai Penguasa Kastam Gred WK44 (memangku) dan dibayar gaji, kesemua faedah, dan bonus yang sewajarnya mengikut pangkat serta kelayakannya;

E

F

2.4 Bahawa satu Perintah *Mandamus* diberi untuk mengarahkan Responden-responden;

2.4.1 Mengembalikan semula jawatan Pemohon selaku Penolong Pengarah Kastam di Ibu Pejabat, Jabatan Kastam Diraja Malaysia, Bahagian Perkhidmatan Teknik, Cawangan Perakaunan Hasil dan membayar gaji yang berselari dengan pangkat serta kelayakan Pemohon;

G

2.4.2 Membentuk sebuah jawatankuasa bagi menentukan jumlah tunggakan gaji, elaun, dan faedah yang berhak dinikmati oleh Pemohon bermula dari tarikh pembuangan kerja Pemohon hinggalah ke tarikh penyelesaian penuh;

H

2.4.3 Membayar ganti rugi kerana tindakan Responden-responden telah mencemarkan nama baik serta memalukan Pemohon;

2.4.4 Membayar ganti rugi am dan/atau ganti rugi teruk dan/atau ganti rugi teladan dan/atau ganti rugi punitif atas penyiasatan yang tidak komprehensif, juga atas sikap ketidaktepatan dalam membuat pertimbangan yang mana akhirnya telah menyebabkan Pemohon mengalami kejutan mental dan gangguan emosi yang teruk;

I

- A 2.4.5 Membayar faedah atas kadar 5% setahun dari tarikh pembuangan kerja (12hb Februari 2018) hingga ke tarikh perintah;
- 2.4.6 Membayar faedah atas kadar 5% setahun dari tarikh perintah hingga ketarikh penyelesaian penuh;
- B 3. Kos tindakan ini ditanggung oleh Responden-Responden; dan
4. Sebarang relif lain yang dianggap adil dan suai manfaat oleh Mahkamah yang Mulia ini.
- C [10] The grounds for seeking the forgoing reliefs were set out in the appellant's statement delivered pursuant to O. 53 r. 3(2) of the Rules of Court 2012 and they were as follows:
5. Alasan-alasan yang menyokong permohonan ini adalah:
- D 5.1 Keputusan buang kerja yang dikenakan terhadap Pemohon adalah bercanggah dengan peruntukan perundangan semasa (Illegality) dan *ultra vires*:
- 5.2 Faktor maklumat tidak lengkap serta tidak komprehensif:
- 5.3 Faktor sistem pengurusan kehadiran yang tidak mengikut spesifikasi;
- E 5.4 Faktor kehilangan bukti-bukti yang relevan menyukarkan Pemohon memberikan justifikasi terhadap pertuduhan;
- 5.5 Tugas Pemohon selaku pegawai Audit adalah perlu sentiasa bekerja di luar pejabat (Nature of business);
- F 5.6 Pemohon mempunyai rekod prestasi yang baik sebelum dan selepas ditukarkan ke Jabatan Kastam Diraja Malaysia, Pahang pada 06/01/2014:
- 5.7 Pemohon tidak diberi peluang menjalani proses tindakan tatatertib yang adil dan tulus; (Procedural Impropriety)
- G 5.8 Tiada sebarang amaran bertulis atau secara lisan oleh Ketua Jabatan/Pejabat/Penyelia berkenaan kemerosotan prestasi kerja Pemohon:
- 5.9 Terdapat unsur 'selective' atau '*mala fide*' dalam tindakan jawatankuasa tatatertib kerana terdapat juga pegawai yang tidak mengemaskini rekod kehadiran, tidak mengketik, datang lewat, pulang awal dan tidak hadir kerja, namun tiada sebarang tindakan dan/atau siasatan dan/atau hukuman dikenakan terhadap mereka:
- H dan
- 5.10 Terdapat kelewatan dan/atau penangguhan masa yang tidak munasabah "time laches" dalam tindakan yang telah diambil terhadap Pemohon: dan
- I Lain-lain alasan yang terdapat dalam Afidavit Sam Maark a/l Verak (No. K/P: 771021-08-7279) yang diikrarkan pada 08 haribulan Mei 2018, dan difailkan disiniakan dibaca untuk menyokong permohonan ini.

[11] It was the appellant's contention in his affidavit, filed in support of his application for judicial review, that the complaints should have been referred to his supervisors and he should have been given a chance to explain prior to the charges being preferred. It was also contended that a prior comprehensive disciplinary investigation ought to have been carried out. The appellant complained that he was never given any prior warning regarding his failure to record time. The appellant then referred to the fact that there were regulations and procedures for recording time, including procedures for monitoring time recording by officers, which procedures should have been first invoked. He also complained that he was not given an oral hearing.

A

B

[12] The appellant also claimed that his car was stolen on 19 April 2017 along with his official diary, "thumb-drive" and some documents that were in the car. A police report was lodged by the appellant on 20 April 2017. In his police report, the appellant stated specifically, "Di Dalam Kendaraan Saya Terdapat Dairi Harian Rasmi, Document Tugasan Dan Sijil-sijil Sejak Tahun 2014."

C

D

[13] The appellant also maintained that the electronic recording system that was provided was problematic and many do not use it. It was also alleged that there was an element of *mala fides* in that disciplinary proceedings have not been taken against others who have not recorded time as required. As a result, he encountered difficulties in justifying events that occurred some three years prior.

E

[14] The appellant explained that as an audit officer at the material time, his work involved being out of the office. He would often be instructed by his superiors to launch and carry out audits in various places. The places can be very distant and it would have been impossible for him to return to the office to record the time of his arrival at, and leaving from, the office.

F

[15] The appellant deposed that he had never been accused of absenteeism or of under-performing. He had been the recipient of a certificate of appreciation and an outstanding service award in 2014 and was promoted from grade W41 to grade W44 effective on 1 December 2014. He also maintained that a lesser punishment should have been considered.

G

[16] In his affidavit, the Chairman of the Public Services Commission stated that in regard to the first charge against the appellant, he was found to have been absent from work for 25 days over the period from February 2014 to July 2015. This was fewer than the 84 days set out in the first charge. It was also found that the appellant had failed to report at the Bentong Station, although he was given written instructions dated 14 October 2014 to do so. The appellant's explanation for not recording his attendance due to his fieldwork was found not a justifiable excuse. In respect of the first charge, the appellant was found to have breached reg. 4(2)(g) and 4(2)(i) of the Public Officers (Conduct and Discipline) Regulations 1993.

H

I

A [17] In relation to the second charge, it was found that the appellant had failed to clock in on four occasions and had failed to clock out on 14 occasions. This was fewer than the 29 times set out in the second charge. His explanation that the electronic recording device “fingertac” failed was found not acceptable as there was an alternative provided for such occasions.
B There was in place a system of manual recording in a book that could have been used by the appellant. The appellant’s explanation that he was attending to official duties outside the station was found not justifiable as he could have recorded his attendance after performing his official duties or before leaving the office to perform his duties. In addition, there were no written instructions disclosed by the appellant to support his explanation that he was out of office on official business on those occasions. The appellant was found to have breached reg. 4(2)(g) and 4(2)(i) of the Public Officers (Conduct and Discipline) Regulations 1993.
C

[18] As for the third charge, the appellant was found to have been late in reporting for duty without leave or any justifiable cause on 23 occasions. This was also fewer than the 26 times set out in the third charge. That he had to return to his residence in Puchong, Selangor, to take care of his family, despite his having a rented room in Bentong, was found not to be an acceptable excuse. The appellant’s claim to have been on official visits was not supported by any written instructions given and this explanation given was also found wanting. The reason given that he had gone to collect his National Registration Identity Card and the “WhatsApp” messages relied upon by the appellant did not disclose that he was granted any permission to be late for work by his Head of Department. The appellant was found to have breached reg. 4(2)(g) and 4(2)(i) of the Public Officers (Conduct and Discipline) Regulations 1993.
D
E
F

[19] Regulations 4(2)(g) and 4(2)(i) of the Public Officers (Conduct and Discipline) Regulations 1993 state as follows:

General
G (2) An officer shall not:
(a) ...
(g) be irresponsible;
...
H (i) be insubordinate or conduct himself in any manner which can be reasonably construed as being insubordinate;

[20] The comments of the appellant’s supervisors in support of the appellant were held to be general in nature and did not exculpate the appellant for those occasions that the appellant was found to be in breach as per the charges. That the appellant’s diary and documents were stolen along with his car, was found not to be a valid excuse as the required information could have been obtained from the department itself.
I

[21] The Chairman of the Public Services Commission of Malaysia in his affidavit also stated that an officer may be promoted as long as the officer was not subject to disciplinary proceedings, referring to Pekeliling Perkhidmatan Bilangan 3 Tahun 2009, Dasar Kenaikan Pangkat Bagi Pegawai Hukuman Tatatertib.

A

[22] By reason of its findings, the appellant was dismissed by the Public Services Commission of Malaysia.

B

[23] Before this court, and in the written submissions of learned counsel for the appellant, four specific issues were proffered as to why the appellant's appeal should be allowed.

C

The Appellant's Contentions

[24] The appellant's contentions before this court were quite specific. In his written submissions, learned counsel had headed his first ground "Pertuduhan Yang Cacat". Under this heading, the contention was predicated on paras. 27, 28 and 29 of the learned High Court Judge's grounds of judgment.

D

[25] In paras. 27, 28 and 29 of the grounds of judgment, the learned High Court Judge stated as follows:

[27] Responden kedua di dalam affidavit beliau (Lampiran 32) di perenggan 4.7 telah menerangkan bahawa setelah dikaji telah dikenalpasti jumlah ketidakhadiran dan kegagalan memetik kad perakam waktu tanpa kebenaran atau tanpa sebab yang munasabah. Perbandingan telah dibuat dengan memo-memo yang mengarahkan pemohon hadir untuk mesyuarat, kursus, kerja audit, ceramah, perbincangan seperti yang dikemukakan oleh pemohon dieksibit SMV-2, SMV-5, SMV-11, SMV-12 (rekod kehadiran) yang berkaitan dengan pertuduhan-pertuduhan terhadapnya. Jelas perbuatan-perbuatan seperti dalam pertuduhan-pertuduhan berlaku walaupun jumlah hari dan kegagalan memetik kad perakam dikurangkan setelah perbandingan dan penjelasan diambil kira.

E

F

[28] Sistem rakaman kehadiran disediakan secara elektronik dan manual jika berlaku kerosakan. Buku kehadiran secara manual menunjukkan sebarang catitan oleh pemohon. Tarikh-tarikh 14.12.2014, 16.12.2014 dan 24.12.2014 tiada sebarang memo atau surat mengarahkan pemohon bertugas di luar pejabat.

G

[29] Tidak dinafikan jumlah hari ketidakhadiran dan kegagalan mengetik kad perakam waktu, setelah diteliti akan representasi pemohon, tidak seperti jumlah yang dinyatakan di dalam pertuduhan-pertuduhan. Namun ianya tidak bermakna keputusan responden kedua terjumlah kepada ketaksahan, tidak munasabah atau ketidakpatuhan. Pemohon berjaya menyangkal sebahagian tarikh-tarikh yang dinyatakan tetapi tidak kesemua tarikh-tarikh di dalam ketiga-tiga pertuduhan-pertuduhan. Ini menunjukkan penelitian dilakukan oleh responden kedua di dalam membuat pertimbangan bagi keputusan yang dicapai.

H

I

A [26] Based upon what was set out in those paragraphs, it was maintained that the learned High Court Judge was aware that the charges levelled against the appellant were defective. The number of days stated in the charges were not all proven. Accordingly, it was submitted, the charges were successfully refuted by the appellant.

B [27] The appellant's second contention was that there was no prior internal investigation before the appellant was charged and disciplinary action taken. An internal investigation would allow the appellant an opportunity to provide his explanation before any disciplinary action is taken. As for this contention reliance was placed on regs. 6.1.2 and 6.1.4 of the General Orders
C "Perintah Am Bil. 177 – Pelaksanaan Dan Pemantauan Kehadiran Waktu Berkerja" dated 13 March 2017 which provides as follows:

6. PEMANTAUAN

6.1 Sistem Perakam Waktu Elektronik (PWE)

D 6.1.1 Pegawai Pentadbir Sistem PWE (PPS) mengeluarkan laporan bulanan setiap pegawai untuk semakan.

6.1.2 Pegawai hendaklah mengemukakan penjelasan sebab ketidakhadiran/ datang lewat/pulang awal.

E 6.1.3 Pegawai Penyelia hendaklah memberikan pengesahan terhadap alasan yang dirasakan munasabah dan kemukakan kepada pihak KPSM.

F 6.1.4 Pegawai Penyelia hendaklah mengeluarkan surat meminta penjelasan kepada pegawai dan datang lewat atau pulang awal sebanyak tiga (3) kali dalam tempoh sebulan. Pegawai tersebut hendaklah mengemukakan surat penjelasan secara bertulis kepada Pegawai Penyelia dalam tempoh 14 hari dari tarikh surat tersebut. Sekiranya Pegawai Penyelia tidak berpuashati dengan surat penjelasan tersebut, Amaran Bertulis Pertama perlu dikeluarkan.

G [28] It was contended that by reason of regs. 6.1.2 and 6.1.4, there has to be an internal inquiry failing which, as in this case, there would exist, procedural impropriety.

H [29] The appellant's third contention turned on issues of fact. It was contended that the learned High Court Judge had erred in disregarding the fact that the appellant as an audit officer was, upon instructions, required to work out of office. It was contended that the appellant's supervisors' views in supporting the fact that the appellant's duties involved being out of the office were not considered or given adequate consideration. Two of the appellant's supervisors had supported the appellant in the disciplinary proceedings and had maintained that the appellant was an exemplary officer and had confirmed that his duties often required him to be out of the office.
I The appellant also pointed to the fact that there were in evidence memoranda

instructing the appellant to attend for assignments, courses and other matters. Notwithstanding the evidence, the appellant was found guilty of the charges and dismissed. This, it was maintained was irrational.

A

[30] The appellant's fourth contention was pivoted on reg. 37(5) of the Public Officers (Conduct and Discipline) Regulations 1993. Regulation 37(5) provides as follows:

B

(5) If the appropriate Disciplinary Authority is of the opinion that the case against the officer requires further clarification, the Disciplinary Authority may establish an Investigation Committee for the purpose of obtaining such further clarification.

C

[31] The appellant's contention was that it was clear from the evidence that the appellant had left his office to carry out his duties on instructions given. In the circumstances, it was necessary that an investigation committee be established to investigate the issue.

[32] Lastly, although not given a specific heading in the written submissions for the appellant, the proportionality of the punishment meted out to the appellant was addressed. The contention that the punishment meted out was disproportionate and too severe was included as additional grounds of appeal in the appellant's supplementary memorandum of appeal.

D

[33] Learned Federal Counsel on behalf of the respondents refuted the appellant's contention. It was contended that the learned High Court Judge was correct when His Lordship held that the charges were not defective in themselves merely because the tribunal had found that the appellant was at fault fewer than the number of days set out in the charges. It was also contended that there was no requirement that a prior internal inquiry be conducted before disciplinary proceedings may be commenced. In addition, it was contended that the learned High Court Judge did not err in holding that it was up to the disciplinary authority to consider whether an investigation committee should be established. Besides, it was contended, the appellant never requested for an oral hearing. As for the proportionality of the punishment meted out to the appellant, it was contended that it was entirely within the remit of the disciplinary tribunal to determine the seriousness of the misconduct and to decide on the punishment.

E

F

G

The Appellant's Appeal

[34] The principles relating to judicial review of administrative and quasi-judicial decisions have undergone much change. This is undeniably and obviously so after the decision of the Federal Court in *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145. In 2000, following the decision in *R Rama Chandran*, O. 53 of the Rules of the High Court 1980 that caters for applications for judicial review was amended. There were further amendments to O. 53, resulting in the iteration of that order as it now appears in the Rules of Court 2012.

H

I

- A [35] While the principles relating to judicial review have evolved, there is still a difference in the extent of the court's powers in a judicial review, when compared to an appeal properly so-called. The latitude for appellate intervention in a decision of a court of first instance is wider than when the court exercises its judicial review powers over non-judicial tribunals. The latter is the exercise of a supervisory jurisdiction developed by the common law while the former is an appellate jurisdiction derived from statute.
- B

[36] It is, in this respect, worthwhile to refer to what Edgar Joseph Jr FCJ said in *R Rama Chandran*, at pp. 176-177 (CLJ); p. 191 (MLJ):

- C The starting point is to define 'Judicial Review'. According to 37 *Halsbury's Laws* (4th Ed) para 567, the process of Judicial Review is that:

... by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties.

- D Next, it is necessary to compare appellate review jurisdiction with supervisory review jurisdiction.

- E It is clear law that appellate review jurisdiction is solely a creature of statute while supervisory review jurisdiction is the creature of the common law and is available in the exercise of the courts' inherent power but, I would hasten to add, its extent may be determined not merely by judicial development but also by legislative intervention. As Abbott CJ put it succinctly in *R v. Cashiobury Hundred Justices* (1823) 3 Dow & Ry 35; 26 RR 604:

- F [Supervisory review] always lies, unless it is expressly taken away, and an appeal never lies, unless it is expressly given by ... statute

It is true that both appellate review and supervisory review are concerned with the correction of error but, it has often been said, that they are radically different processes.

- G Where statute provides simply for an appeal, the appellate court has power to re-hear the whole case and, when satisfied that the judgment appealed against cannot stand, it may set aside the judgment and make such orders as ought to have been made at first instance. Thus, appellate jurisdiction is concerned with the merits of a case.

- H [37] In *R Rama Chandran*, Edgar Joseph Jr FCJ expressed, by reference to the schedule in the Courts of Judicature Act 1964, that:

- I it would be wrong to assume that the extent of the power of the courts in Malaysia in the field of Public Law remedies is limited in the same manner as that of the courts in the United Kingdom, where there are no such equivalent provisions.

[38] This wider power that exists was spoken of by Edgar Joseph Jr FCJ in the context of the power to mould the remedy that a court may afford an applicant to suit the justice of the case. As His Lordship stated:

The need for such a wider power is illustrated by the case of *Chief Constable of North Wales Police v. Evans* where the House of Lords was struggling to mould the remedy to suit the justice of the case. ...

Needless to say, if, as appears to be the case, this wider power is enjoyed by our courts, the decision whether to exercise it, and if so, in what manner, are matters which call for the utmost care and circumspection, strict regard being had to the subject matter, the nature of the impugned decision and other relevant discretionary factors. A flexible test whose content will be governed by all the circumstances of the particular case will have to be applied.

On the other hand, having regard to the rapidly developing law in applications for Judicial Review, whenever legally permissible, we must demonstrate a willingness to mould the remedies available to suit the justice of the case.

[39] The limits within which courts may exercise its supervisory power of review are, at this point in time, quite settled. It is where the decision challenged may be said to be marred by illegality, irrationality or procedural impropriety. The meaning for each of these heads of challenge have also been the subject of judicial explanation and their respective ambits are sufficiently clear. They stem from the decision of the House of Lords in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 and in particular, the speech of Lord Diplock. However, Lord Diplock was hesitant in adopting the principle of proportionality stating that, “I have in mind particularly the possible adoption in the future of the principle of “proportionality” which is recognised in the administrative law of several of our fellow members of the European Economic Community; ... In fact, shortly after *R Rama Chandran*, Edgar Joseph Jr FCJ in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1, after referring to the decisions in several English cases, applied the principle of proportionality in that case stating that, “... the severity of the requirements of the disputed condition would be out of all proportion to the extension of planning permission sought.” Since then the principle of proportionality in judicial review has gained much momentum (see *Dr Lourdes Dava Raj Curuz Durai Raj v. Dr Milton Lum Siew Wah & Anor* [2020] 9 CLJ 192; [2020] 5 MLJ 185; *Nazrul Imran Mohd Nor v. Civil Service Commission Malaysia & Anor* [2021] 10 CLJ 737; [2021] 6 MLJ 750 CA; *Iszam Kamal Ismail v. Prestij Bestari Sdn Bhd; Majlis Peguam Malaysia (Intervener)* [2017] 10 CLJ 417; [2018] 5 MLJ 536). Proportionality also has a constitutional dimension but which is not relevant

A for the purposes of this case (see the discussion in *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579; [2021] 1 MLJ 750; *Letitia Bosman v. PP & Other Appeals* [2020] 8 CLJ 147; [2020] 5 MLJ 277; *Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19; [2006] 6 MLJ 213).

B [40] The foregoing basic principles have been reiterated to underscore the fact that there still remains a fundamental juristic difference between an appeal and a judicial review. The court should therefore be mindful not to transgress the line between the two that is delineated by the tests and principles of illegality, irrationality, procedural impropriety and proportionality.

C [41] In relation to the finding of guilt against the appellant, there is no logical or rational basis why the charges may be said to be defective merely because the total number of days the appellant was found to have been absent from duty or had failed to record his attendance did not match the exact number of days set out in the charges.

D [42] The Chairman of the Public Services Commission in his affidavit had candidly disclosed that the total number of days that the appellant was found to have been absent from duty and the number of days that the appellant had failed to record his attendance, including when he left his office, were fewer than those presented in the charges. One cannot help concluding that this indicates that there was sufficiently careful consideration of the charges presented without which these findings could not have been made. In this regard we agree with what the learned High Court Judge had stated in para. 29 of His Lordship grounds of judgment:

F Namun ianya tidak bermakna keputusan responden kedua terjumlah kepada ketaksahan, tidak munasabah atau ketidakpatuhan. Pemohon berjaya menyangkal sebahagian tarikh-tarikh yang dinyatakan tetapi tidak kesemua tarikh-tarikh di dalam ketiga-tiga pertuduhan-pertuduhan. Ini menunjukkan penelitian dilakukan oleh responden kedua di dalam membuat pertimbangan bagi keputusan yang dicapai.

G In para. 30 of His Lordships grounds of judgment, the learned High Court Judge then concluded, and in our view rightly:

H [30] Malah andainya cuma satu sahaja pertuduhan dapat dibuktikan dan tiada kecacatan berlaku keputusan responden kedua tidak boleh diketepikan apatah lagi dalam kes ini ketiga-tiga pertuduhan dibuktikan. Oleh itu Mahkamah ini tidak mendapati berlakunya kecacatan dari segi ketaksahan atau tidak munasabah di pihak responden kedua walaupun adanya tarikh-tarikh di dalam ketiga-tiga pertuduhan dapat disangkalkan oleh pemohon.

I

[43] As for the requirement of a prior internal inquiry, the starting point must be the validity of the procedure that has been laid down and applied. In *Abdul Aziz Mohd Alias v. Timbalan Ketua Polis Negara, Malaysia & Anor* [2010] 3 CLJ 643, at p. 659, Zulkefli Makinudin FCJ (as His Lordship then was) delivering the judgment of the court stated:

[24] On the requirement for the provisions in any disciplinary procedure or regulations such as the 1993 Regulations to comply with the principles relating to procedural and substantive fairness guaranteed under arts. 5(1) and 8(1) of the Federal Constitution as contended by learned counsel for the appellant, *we only need to state here that the Federal Court in Lembaga Tata tertib Perkhidmatan Hospital Besar Pulau Pinang & Anor. v. Utra Badi K Perumal (supra) had already decided that the General Orders which in our view would include the 1993 Regulations are in accord with the principles of natural justice and procedural fairness* wherein at p. 551 it had this to say:

Taking all the above into consideration, we are of the view that the General Orders, in detailing the procedure therein, have sufficiently complied with art. 135(2) of the Federal Constitution and, in the process, are in accord with the concept of natural justice and procedural fairness.

(emphasis added)

[44] In maintaining that there should first be an internal inquiry, and as mentioned, reliance was placed on regs. 6.1.2 and 6.1.4 of the general orders “Perintah Am Bil. 177 - Pelaksanaan Dan Pemantauan Kehadiran Waktu Berkerja” dated 13 March 2017.

[45] These regulations, evident from the title given, are for the implementation and monitoring of attendances at work. Two systems for recording the time an officer reports for work and leaves work were implemented namely “Sistem Perakam Waktu Elektronik” and “Sistem Kad Perakam Waktu”.

[46] Regulation 6 of these regulations is headed “Pemantauan”. The regulations are clearly for the purpose of monitoring. Thus, reg. 6.1.1 requires the officer who is the administrator to issue a monthly report on each officer for review. Regulation 6.1.2 requires the officer to provide reasons for his absence. Regulation 6.1.3 requires the supervisor to provide confirmation of the reasons given that are regarded as reasonable. Regulation 6.1.4 requires the supervising officer to obtain an explanation from an officer who is late to work or leaves early for more than three times a month.

[47] That there exist systems and regulations for monitoring attendance at work, the time an officer arrives for work and leaves and the requirement of monthly reports leave no doubt that attendance at work is clearly a matter of significant importance. That such regulations are required also suggests that there is a need for them.

A [48] However, nowhere is it suggested that there is a need for an internal inquiry before disciplinary action may be taken. It also cannot be the case that should there be a failure of a supervising officer to invoke reg. 6.1.4, disciplinary action may therefore never be taken. In our view, the disciplinary provisions under the Public Officers (Conduct and Discipline) Regulations 1993 and the “Perintah Am Bil. 177 – Pelaksanaan Dan Pemantauan Kehadiran Waktu Berkerja” dated 13 March 2017 are two discrete sets of regulations. Neither is conditional upon the other being first invoked.

C [49] Was there also a need for a committee of investigation to be constituted under reg. 37(5) of the Public Officers (Conduct and Discipline) Regulations 1993 as contended by the appellant? We do not think so. It is quite clear that reg. 37(5) was designed to assist the disciplinary tribunal if it is of opinion that the case against the officer concerned requires further clarification. In such an event, the disciplinary tribunal may then establish an investigation committee for the purpose of obtaining further clarification.

D [50] Reliance was placed on the decision of this court in *Ang Seng Wan v. Suruhanjaya Polis Di Raja Malaysia & Anor* [2002] 1 CLJ 493; [2002] 2 MLJ 131. In that case, four charges were preferred against the appellant. The facts disclosed that in the appellant’s written representation in respect of two of the charges, the appellant had denied receiving any bribe. In addition, his denial was corroborated by a statutory declaration sworn by one Sanmugam who denied receiving or giving any money to the appellant. The third and fourth charges were said to be inter-related with the first two charges. In addition, in respect of the third charge, which concerned the appellant’s failure to report of illegal gambling activities in Seremban, the appellant’s defence was that he had no such information. This was because the appellant was attached to IPD cawangan mahkamah as a prosecuting officer. Most significantly, in that case, was the fact that there was no evidence provided to the contrary by the respondent. The evidence of Sanmugam was also not challenged.

G [51] It was in those specific circumstances in the case of *Ang Seng Wan* that it was held that an oral hearing should have been held based on the then General Order 26(4) of Public Officers (Conduct and Discipline) (Cap D) General Orders 1980. As Mohd Saari JCA, delivering the judgment of the court at p. 497 (CLJ); p. 136 (MLJ), stated:

H Under O. 26(4) of the General Orders 1980, it states:

[I]f the officer does not furnish any representation within the specified time, or if he furnishes a representation which fails to exculpate himself to the satisfaction of the Appropriate Disciplinary Authority, it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

I

In applying O. 26(4) aforesaid to the facts and circumstances of this case, we are of the view that, by his letter dated 23 July 1993, ASP Ang had given sufficient exculpatory statement to rebut all the four charges. On the other hand, with regard to the defence's case, we find no evidence whatsoever to substantiate the four charges.

A

[52] Mohd Saari JCA then stated succinctly in *Ang Seng Wan*, at p. 498 (CLJ); p. 136 (MLJ):

B

However, what troubles this court is that, from the record, there is no evidence whatsoever to rebut or contradict the exculpatory statement of Ang.

[53] The circumstances found to be vital in *Ang Seng Wan* were not present in the case at hand. Here, evidence of the appellant's failure to record his attendance and time of arrival and departure from work were supported by the appellant's service record book and the entries therein and the attendance report based on a record book. The defences provided by the appellant were either not corroborated or did not justify his absence from duty or his failure to record the time of his arrival at and leaving the office.

C

D

[54] In the circumstances of this case, we agree with the learned High Court Judge's reliance on the decision of the Federal Court in *Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu* [2008] 6 CLJ 573. Although that case was concerned with the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980, the manifest intention of reg. 35(7) of the Public Officers (Conduct and Discipline) Regulations 1993 as expressed therein, accords with the statement made by Zaki Tun Azmi PCA (as His Lordship then was) in delivering the judgment of the Federal Court in that case, where His Lordship stated:

E

F

[43] I had mentioned in para 22 above, according to GOs 24, 25 and 26, the decision whether to refer a case to a committee of inquiry is the discretion of the disciplinary authority. *In so deciding whether to refer to the committee of inquiry, the disciplinary authority would have to consider the written representation of the respondent ie, whether his written representation exculpated himself from the charges preferred against him.*

G

[44] From these GOs, *it can be clearly concluded that it is the disciplinary authority and not the court who is to decide whether the officer in his written representation has exculpated himself.*

(emphasis added)

H

[55] There is then the appellant's contention that he had instructions to work outside office. It was also maintained that there was no inquiry made with his supervisors for further evidence of his work and of the charges against him. No evidence of any specific instructions was provided by the appellant to exculpate himself from the charges in respect of all those occasions that he was found to have failed to report or record as required. In fact, evidence was led from his supervisors but there was little if any

I

- A specificity in the evidence to justify the appellant's failure to report for duty or record his time of arrival for and departure from work on those specific days that he was found to have failed to do so. That he had to work out of office on occasions was confirmed by his supervisors but there was no justification given for why he had failed to report for work on those occasions
- B that were proven or why he had failed to record his time of arrival and departure from office.

[56] More importantly, and on this finding of fact, the observations of Mohd Saari JCA in *Ang Seng Wan* is pertinent:

- C It follows, therefore, that the court is not involved in the evaluation of evidence which transpired at the disciplinary proceeding as stated by Abdoolcader J in *Mak Sing Kwong v. Minister of Home Affairs, Malaysia* (No 2) [1975] 2 MLJ 175 at p. 178:

- D Once it is conceded that there is some evidence to support a finding of fact then the court has no jurisdiction to probe into its relative probative force and sufficiency (*Stocker v. Minister of Health* [1938] 1 KB 655, *Jacob v. Attorney General* [1970] 2 MLJ 329).

[57] However, the foregoing must no doubt now be considered with the principle of "irrationality" in mind. As Lord Diplock explained in *Council of Civil Service Unions*:

- E By "irrationality" I mean what can by now be succinctly referred to as "*Wednesbury unreasonableness*" (*Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could
- F have arrived at it.

(emphasis added)

- [58] In light of the foregoing, we are of the view that there was no illegality, procedural impropriety or irrationality demonstrated in respect of the disciplinary proceedings in question, its process or the decision arrived at.
- G

- [59] This leaves the issue of proportionality of the sentence meted out to the appellant. Insofar as this issue is concerned, it has to be pointed out that this was not an issue that was raised in the appellant's statement given pursuant to O. 53 r. 3(2) of the Rules of Court 2012. It would appear to have been an afterthought, having regard to the fact that it was only raised in the appellant's supplementary memorandum of appeal, in paras. 15 and 19.
- H

[60] Order 53 r. 3(2), in respect of the statement to be provided when obtaining leave, is couched in mandatory terms. In the Malaysian Civil Procedure 2018, vol. I at para. 53/3/7 the learned authors state as follows:

- I Under Order 53 r. 3(2), the application for leave must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought (*Dr Dutt v. Assunta Hospital*

[1981] 1 MLJ 304). Grounds omitted in the statement cannot be relied upon at the hearing by the applicant, or at the appellate stage. The principle that a party is bound by his own pleadings applies: *V Paul Raj Chelladurai v. Jabatan Telekom (M) Bhd & 2 Ors* [2000] 1 AMR 2435; [2000] 3 MLJ 652, CA. There is however power in a judge to grant leave to amend the statement pursuant to r. 7.

A

(emphasis added)

B

[61] In *V Paul Raj Chelladurai v. Jabatan Telekom Malaysia Bhd & Ors* [2000] 4 CLJ 882; [2000] 3 MLJ 652, the requirement that the statement must contain the grounds relied upon was strictly applied by the Court of Appeal. Siti Norma Yaakob JCA (as Her Ladyship then was) in delivering the judgment of the court, stated as follows:

C

Order 53 r. 3(1) of the RHC emphasizes the principle that a party is bound by his own pleadings and since that order and rule is mandatory in nature, the omission to plead in the statement the two objections raised before us is sufficient reason for us to hold that this appeal lacks merits and on that conclusion we dismiss it with costs, confirm the order of the High Court and order that the deposit be paid out to the respondents to account of their taxed costs.

D

[62] The court's decision in *V Paul Raj Chelladurai* was, however, based on the former O. 53, under the Rules of the High Court 1980, before its amendment in 2000. The then O. 53 r. 3(1) expressly prohibits reliance on any grounds not set out in the statement. It provided as follows:

E

3. (1) Copies of the statement and of the affidavits in support of the application for leave under rule 1 must be served with the notice of motion or summons under rule 2 and, subject to paragraph (2), **no grounds shall be relied upon or any relief sought at the hearing of the motion or summons except the grounds and relief set out in the said statement.**

F

(emphasis added)

[63] This expressed restriction however no longer appears in the current O. 53 of the Rules of Court 2012. This does not mean that it is no longer vital to set out the grounds relied upon in the statement to be delivered pursuant to O. 53 r. 3(2). What in our view it does mean is that the stringency of the former rule no longer exists but similar to the principles relating to pleadings, a valid objection may still be raised, in appropriate cases, against reliance on grounds not set out in the statement.

G

H

[64] In the case at hand, no objection was raised by the learned Federal Counsel against the appellant's reliance on the lack of proportionality in the sentence handed down, which was not set out in the statement. Learned Federal counsel, however, did refer to and relied upon the decisions of the Federal Court in *Ng Hock Cheng v. Pengarah Am Penjara & Ors* [1998] 1 CLJ 405; [1998] 1 MLJ 153 and *Norizan Bakar v. Panzana Enterprise Sdn Bhd* [2013] 9 CLJ 409.

I

A [65] In the case of *Ng Hock Cheng*, the appellant was a chief storekeeper of the Prisons Department at Kamunting in Taiping, Perak. The appellant had incurred heavy debts and as a result, he became the subject of disciplinary proceedings under the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980. After considering the appellant's representations, the public services commission dismissed the appellant. The appellant maintained *inter alia* that the punishment of dismissal was too severe in the circumstances. The appellant had served for some twenty-eight years and the debts he had incurred were to help his father.

C [66] The question of law posed to the Federal Court in *Ng Hock Cheng* contained two limbs. The first was whether the appellant's dismissal was valid while the second was whether a court had the power to interfere with any punishment meted out. It is the second limb of the question posed that is of specific relevance. On the second limb, Peh Swee Chin FCJ stated as follows, at p. 412 (CLJ); pp. 158 to 159 (MLJ):

D A public officer is entitled to impugn any allegation or accusation of any disciplinary breach against him by way of judicial review on the protection given by art. 135 of the Federal Constitution providing that no member of such service shall be dismissed or reduced in rank except (a) only by an authority that appointed him in the first place; and (b) after being given a reasonable opportunity of being heard. ... If the public officer succeeds in so impugning, any order of punishment including an order of dismissal can be declared invalid or void, and such order being so declared void, is deemed not to have been made at all or is deemed to have been only purportedly made previously. **But if the public officer fails to so impugn, any order of punishment remains and there should be no further review on such order of punishment.**

F To so further review judicially would be acting against the concept, in the case of an order of dismissal, that there should not generally be any employment against the will of employer or employee. After all is said and done, persons in the public service categorised under art. 132 of the Federal Constitution are in fact employees.

G (emphasis added)

[67] Peh Swee Chin FCJ then went on the state, in p. 413 (CLJ); p. 159 (MLJ), as follows:

H To repeat, a court intervenes only on the nature and manner of accusation against a public officer as distinct from a consequential punishment as explained above.

I Just like a professional body being the best tribunal to judge the seriousness of misconduct of its members, **in a similar vein, an employer, including a government is the best person to judge similarly the seriousness of misconduct of an employee.**

(emphasis added)

[68] The Federal Court, in its decision, also went on to affirm the dissent in the judgment of the Court of Appeal in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771. In *Ng Hock Cheng*, Peh Swee Chin FCJ stated of *Tan Tek Seng*, at p. 411 (CLJ); pp. 157 to 158 (MLJ), that:

On appeal to the Court of Appeal, ..., it was held in a majority judgement – in allowing the appeal – that the disciplinary authority must, when deciding what punishment it ought to impose on the particular public servant, act reasonably, and fairly, that if it acted arbitrarily or unfairly or imposed a punishment that was disproportionate to the misconduct, its decision on the punishment was liable to be quashed or set aside. The Court of Appeal then by a majority substituted the order of dismissal in effect with an order that the senior assistant of the primary school be reduced in rank and salary to those of an ordinary teacher.

It was held by the dissenting judge that the court should not substitute its own view as to which was the appropriate penalty for the employee's misconduct, and it was held further whether the punishment should be a dismissal or a lesser penalty like a reduction in rank was not for the court to say.

(emphasis added)

Peh Swee Chin FCJ then went on to state, at 413 (CLJ); p. 159 (MLJ), as follows:

Thus, we are of the opinion that on the narrow point in question, the majority judgment in *Tan Tek Seng* (*supra*) cannot stand though we express our agreement with the minority judgment on the same narrow point.

[69] The dissent in *Tan Tek Seng* was by NH Chan JCA in which His Lordship had stated thus:

The test is not what the Court of Appeal or the High Court thinks should be the appropriate penalty. Whether dismissal or a lesser penalty (like a reduction in rank) was appropriate is not for us to say. The correct test is: Was it reasonable for the employers to dismiss him? Or, put in another way: Might a reasonable employer reasonably have taken the view that the circumstances or gravity of the misconduct of the employee justified his dismissal? *When considering the reasonableness of what a reasonable employer would have done, the court* (whether it be the High Court, Court of Appeal or, for that matter, even the Industrial Court) *must not substitute its own views as to what was the appropriate penalty (for the employee's misconduct) for the view of the particular employer concerned.*

(emphasis added)

[70] In the more recent decision of the Federal Court in the case of *Panzana Enterprise* (*supra*), both the minority decision of NH Chan JCA in *Tan Tek Seng* and the decision of Peh Swee Chin FCJ in *Ng Hock Cheng* were reiterated with approval. In *Panzana Enterprise*, the Federal Court was there concerned with the decision of the Industrial Court in relation to employees

A in the private sector and the Federal Court held that the doctrine of proportionality of punishment was inbuilt into the Industrial Relations Act 1967. As such the Industrial Court had the jurisdiction to decide whether dismissal was too harsh a punishment in circumstances when ascertaining an award under s. 20(3) of the Industrial Relations Act 1967.

B [71] The Federal Court in *Panzana Enterprise* however, drew a distinction between employees in the private sector versus public servants. In delivering the judgment of the court, Raus Sharif PCA (as His Lordship then was) stated of the decision of the Federal Court in *Ng Hock Cheng* and the minority decision in *Tan Teck Seng*:

C [26] There is no dispute that the above two cases involved public servants and disciplinary procedures relating to them. It can also be no dispute that by operation of arts. 135 and 132 of the Federal Constitution, *a public servant who wishes to challenge any allegation of misconduct against him, for which punishment has been imposed, can only do so by challenging it in the High Court by way of judicial review. The said public servant cannot challenge the punishment imposed, but only on the allegations preferred against him.*

D

(emphasis included)

E [72] Clearly, the foregoing statement of the Federal Court regarding public servants was *obiter dictum* as the subject matter before the court concerned a private sector employee and the decision of the Industrial Court. However, the decision of the Federal Court in *Ng Hock Cheng* on the issue of the appropriateness of the punishment in respect of a public servant was not *obiter*.

F [73] The decision in *Panzana Enterprise* has made it clear that the principle of proportionality is embedded in the Industrial Relations Act 1967. Thus, employees in the private sector would have the benefit of that principle. With the acceptance of the ever-expanding doctrine of proportionality, there now does not appear to be any good reason why the doctrine should not be available to public servants in disciplinary matters especially in respect of the punishment meted out by the Public Services Commission.

G

H [74] However, even if the principle of proportionality were to be available for courts to review the punishment imposed on public servants, it would seem reasonable that it should only do so in exceptional cases. Courts should be very slow to deem any punishment meted out in disciplinary cases as being disproportionate. The danger of a court substituting its personal view as to what is or is not proportionate is very real. How strict the public sector wishes to be on matters of discipline may be dependent on many factors and circumstances and the justification may lie in policy developed to confront problems or to address issues that the public sector may be facing and these may not be manifest from the facts of any given case.

I

[75] The strictures imposed by the decision of the Federal Court in *Ng Hock Cheng* and its observation in *Panzana Enterprise* aside, we also do not find that appellant's dismissal was unreasonable or obviously disproportionate such as to warrant any interference by the court. To some, the number of days the appellant failed to report or record as required may be relatively small. However, it is in our view enough to betray an irresponsible attitude of indifference to the need for discipline in a person of the appellant's rank.

A

B

[76] It is important that the court does not, or at the most be circumspect and slow, to impose the weight or importance that the court would have attached to the infractions that the appellant was found to have committed and thereby replace the exercise of the power and discretion of deciding on the punishment to be meted out that is especially conferred, not on the court, but on the public services commission.

C

[77] Both Hanipah binti Farikullah and Lee Swee Seng JJCA have had the opportunity to consider this judgment in draft and they have expressed their concurrence with it.

D

Conclusion

[78] For the reasons given above, the appellant's appeal was dismissed with costs.

E

F

G

H

I